In the Supreme Court of the United States

OCTOBER TERM, 1924

HENRY MERRITT, APPELLANT
v.
THE UNITED STATES
No. 159

APPEAL FROM THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

STATEMENT OF THE CASE

The appellant filed his petition in the Court of Claims, seeking to recover the sum of $5,210.02. A demurrer was filed by the United States, and from the decree of the Court of Claims sustaining the demurrer and dismissing his petition the claimant has appealed to this Court.

The petiton alleges that the appellant, Merritt, is a citizen of the United States, residing at Webster, Massachusetts, where he was engaged in the manufacture of cloth. On or about July 23, 1918, Merritt entered into a contract with the Panama Knitting Mills Company for the furnishing of approximately 15,000 yards of 6/4 Khaki cloth, at $3.20 per yard, according to specifications, which cloth was to be used in the manufacture of puttees for the United

States Army, under a contract the said Panama Mills had with the United States War Department, which contract was numbered 3581–N. Neither contract is set forth in the body of the petition, nor appended thereto as an exhibit. The claimant alleges that the United States, through the War Department, "suspended the contract under which the claimant was working."

After reciting section 1 of the act of Congress approved March 2, 1919 (40 Stat. 1272), known as the Dent Act, the petition proceeds to allege that "thereafter the Secretary of War proceeded to determine and settle the liability of the United States to claimant" (appellant) "and the said Panama Knitting Mills Company, the prime contractor as aforesaid, under the contract aforesaid, under the provisions of the aforesaid act of March 2, 1919, and did order claimant to deliver for the use of the United States, at the contract price of $3.20 per yard as aforesaid, and which claimant did, 7,442⅞ yards of the said Khaki cloth, for which the War Department paid to the Panama Knitting Mills Company for the account of claimant, $3.20 per yard, or $23,817.20 plus $597.19 carrying charges for the five months said cloth had been held by claimant for delivery awaiting adjustment, which settlement claimant is informed was Cancellation Agreement, B–148, dated June 23, 1919, Purchase Section, War Department Claims Board." The petition does not set forth, either in the body thereof or as an appendix, any part or all of the said cancellation agreement.

The petition avers that the claimant did not know at the time that the Government had paid to the Panama Mills the sum of $3.20 per yard for said Khaki cloth; that the Panama Mills nevertheless informed claimant that the Secretary of War had only allowed $2.50 per yard for the said cloth, to wit, 7,442⅞ yards, and that the Secretary was "compelling all contractors to take some loss in their settlements, and upon such fraudulent representation procured release from claimant for the said cloth, at the rate of $2.50 per yard plus the carrying charges of $597.19."

When the War Department learned of the aforesaid acts of the Panama Mills, it "enforced and exacted from the said Panama Mills a return of the difference in the settlement between it and the settlement the Panama Mills had with claimant, or viz, the sum of $5,210.02, which money though demanded by claimant," the War Department refuses to pay to him.

The claimant avers that the release of the Panama Knitting Mills Company was procured by fraud, and was based on no consideration, and on that account claims that the United States owes him the amount for which he brings his suit, to wit, $5,210.02. The petition concludes with the quotation of section 2 of the said Dent Act.

The Court of Claims sustained the Government's demurrer, on the grounds that:

(1) The facts averred do not show a contract, express or implied, between the plaintiff and the United States.

(2) It appears that the Government paid the prime contractor the price for the goods delivered, and if the prime contractor imposed upon plaintiff, that fact does not give a cause of action against the defendant.

ARGUMENT

In the presentation of his case, the claimant elected to take the hazardous course of filing a petition which consisted largely of conclusions of law, instead of statements of fact. A demurrer does not admit anything but facts well-pleaded. Mere averments of legal conclusions are not admitted by demurrer unless the facts and circumstances set forth are sufficient to sustain such averments.

Horsford v. *Gudger*, 35 Fed. 388.

Dennison Mfg. Co. v. *Thomas Mfg. Co.*, 94 Fed. 651.

Three contracts in writing are specifically referred to in the petition. None of said contracts are appended to the petition, and none of them are quoted from, the claimant relying on conclusions of law which he avers arise from the contracts which he has withheld from the scrutiny of the Court. He has ignored the mandatory and wise provisions of Rule 17 of the Court of Claims, which is as follows:

> If the claim be founded upon an express contract with the United States, the substance of such contract must be set forth in the petition, and, if it be in writing, the original or a copy must be annexed thereto. If it be founded upon an implied contract, the facts upon which the claimant relies to prove a

> contract must be specified. If it consists of several matters or items, each must be separately stated.

The recurrence of the word "must" indicates that the Court of Claims regards compliance with this rule as mandatory. True, the claimant's petition was not dismissed on the ground that he failed to comply with said Rule 17, but because, having elected to ignore the rule, he nevertheless failed to set forth a cause of action cognizable in the Court of Claims.

A careful reading of the petition seems to indicate that the claimant relies on the Dent Act, and also on the fraud committed by the Panama Mills in representing to him that it received only $2.50 per yard for the Khaki cloth in question, instead of $3.20 as provided in the cancellation agreement between the Panama Mills and the War Department. To this cancellation agreement, according to the petition, the claimant was not a party. Fraud committed by the Panama Mills certainly does not give the claimant a cause of action against the Government, and we shall dismiss this contention without further comment or argument.

Is this, then, a claim under the provisions of the Act of March 2, 1919 (40 Stat. 1272), known as the Dent Act? The appellant seems to have reached some doubt, because in his brief in this Court he for the first time advances the contention that the cause of action is cognizable not only under the Dent Act but also under the general jurisdiction of the Court of Claims.

The contract between claimant and the Panama Mills, dated July 28, 1918, to which the Government was obviously not a party, provided for the delivery by claimant to said Panama Mills of 15,000 yards of Khaki cloth, at $3.20 per yard.

Contract 3581–N, between the War Department and said Panama Mills, provided for manufacture and delivery by said mills to the Government of certain puttees for the use of the Army. It is to be noted that the date of said contract is not given in the petition. Neither is the date mentioned in the petition on which the claimant contends that the War Department "suspended the contract under which the claimant was working." The only contract "under which the claimant was working" was its contract with the Panama Mills. Where, when, and how did the War Department "suspend" said contract? The claimant contents himself with a bald statement of a legal conclusion. However, let us draw the most favorable inference to the claimant, and conclude that the suspension referred to means a suspension of operations under the contract 3581–N between the War Department and the Panama Mills, and that this suspension affected the claimant in continuing his manufacture and delivery of the cloth to the Panama Mills, under his contract with said Panama Mills.

Treating the claimant as a subcontractor, let us ascertain his rights under the Dent Act, if he has any, that he may prosecute in the Court of Claims.

The relief provided by said act is intended to be accorded contractors whose contracts with the Government have not been executed in the manner provided by law. The Secretary of War, in considering claims brought by contractors, is given the authority by section 4 of the act to require the prime contractor to present satisfactory evidence of having paid his subcontractor, or of the consent of the subcontractor to look for his compensation to said prime contractor; this failing, the Secretary shall pay directly to the subcontractor the amount found to be due him under the award. The subcontractor, however, must have entered into his contract with the prime contractor "with the knowledge and approval of any agent of the Secretary of War duly authorized thereto."

One scans the petition in vain to find any averment that the War Department, through any agent duly authorized thereto, either knew or approved of the contract entered into between the claimant and the Panama Mills for the furnishing by the former to the latter of the Khaki cloth to be fabricated by the Panama Mills into puttees for the War Department. Nor is there any allegation that the subcontractor presented his claim, in which event, however, the Secretary of War could have done one of the following things only: either pay the entire award to the prime contractor, satisfied with his evidence that the subcontractor would look to him for compensation, or pay direct to the subcontractor such amount as would be found due him under the award.

The petition avers instead that the Secretary of War ordered the claimant to deliver to the Panama Mills a reduced quantity of the cloth at the price of $3.20 per yard, with which order the claimant complied. The Secretary, instead of making a Dent Act award, entered into Cancellation Agreement B–148, with the Panama Mills, and entered into a new contract with the claimant, according to the petition. The appellant's brief (p. 2) states:

> The order for and the delivery of the goods was after the old or prime contract had been suspended. (See paragraph 3 of the petition.) When the War Department ordered claimant to deliver the goods he had on hand, as alleged in paragraph 4 of the petition, above set out, although he had been a subcontractor before, there was a new and an original contract, which was completed by the delivery of the goods.

This is an apparent, though belated, abandonment of the theory that his right to recover is founded on the Dent Act. Suffice it to say, in closing this phase of the argument, that if it is the new contract on which the claimant bases his cause of action, that contract was obviously made later than November 12, 1918, and therefore the Court of Claims had no jurisdiction under the Dent Act.

The appellant argues that the "order" by the War Department to deliver the reduced quantity of Khaki cloth to the Panama Mills "for the use of the United States," followed by such delivery, fixes the Govern-

ment's liability. It is hardly to be presumed that any Court will regard a mere statement of a legal conclusion as sufficient to establish the agency of the Panama Mills.

> By common consent of the parties [says Appellant, p. 3 of his brief] and for the convenience of the Government, the old prime contractor, the Panama Knitting Mills Company, out of whose contract and the cancellation thereof the new one with claimant was made, was designated the agency through whom payment would be made.

If this surprising statement be based on any facts, these facts must be found in the Cancellation Agreement B–148, which the claimant pleads without disclosing as required by the rules of the Court of Claims. The entire presentation of this case, by both sides, must necessarily be based largely on surmise, because of the refusal of the claimant to set forth in his petition enough facts to advise the Court as to what the controversy is all about. The very physical structure of paragraph 4 of the petition, for example, is so involved that it is impossible, even with the aid of the appellant's cryptic brief, to ascertain whether the contract on which the claimant sues is or is not incorporated in the said cancellation agreement itself. If so, the agreement is the only and the best evidence of its contents. If the "order" of the War Department was not contained in said Cancellation Agreement, we are not advised as to whether it was in writing, by whom made, or as to any of the circum-

stances from which the very existence of any contract could be inferred.

In short, the claimant has failed utterly to present a claim that constitutes a cause of action, and the judgment of the Court of Claims should be affirmed.

JAMES M. BECK,
Solicitor General.
ROBERT H. LOVETT,
Assistant Attorney General.
ROSCOE R. KOCH,
Special Assistant to the Attorney General.

OCTOBER, 1924.

○